UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NOS. 00-10376-GAO,
00-10384-GAO and 00-12541-GAO
(consolidated)

EDMUND F. BURKE,
Plaintiff,

v.

TOWN OF WALPOLE, et al.,
Defendants.

ORDER GRANTING MOTION TO DISMISS
January 22, 2004

O'TOOLE, D.J.

The Commonwealth of Massachusetts moved to dismiss the claims asserted by the plaintiff against it (# 232). I referred the motion to Magistrate Judge Cohen for hearing and a report and recommendation. After hearing, the Magistrate Judge recommended that the motion be granted (# 277). The plaintiff has not objected to that recommendation.

After careful review, I accept and approve the Magistrate Judge's report and adopt his recommendation. The motion of the Commonwealth is GRANTED, and the complaint is dismissed with prejudice as to the Commonwealth.

It is SO ORDERED.

January 22, 2004
DATE

\s\ George A. O'Toole, Jr.
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
00-10376-GAO
00-10384-GAO
00-12541-GAO

EDMUND F. BURKE

Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS

Defendants

REPORT AND RECOMMENDATION ON
MOTION TO DISMISS
FILED BY THE COMMONWEALTH OF MASSACHUSETTS

October 8, 2003

COHEN, M.J.

This is a civil rights case with pendent state law claims. The action is brought against some seven named Massachusetts State Police Officers, various and sundry "John Does", "Other Officials of the Commonwealth of Massachusetts", the Commonwealth of Massachusetts, the Town of Walpole, police officers from the Town of Walpole, and

various forensic examiners, including defendants Crowley, Kessler, Evans, and Levine[1] in Civil Action No. 00-10384-GAO.[2]

Generally speaking,[3] the underpinnings of this case began with the murder of one Irene Kennedy in Walpole, Massachusetts. The crime scene search indicated that Mrs. Kennedy had multiple stab wounds, from which she died. A possible bite mark was observed on her breast, and photographs of that bite mark were made. At some point during the investigation, investigators of the Massachusetts State Police focused their

---

[1] This and the related cases have a rather tortuous procedural history. Plaintiff initially commenced suit against the Town of Walpole, certain police officers of the Town of Walpole, and Dr Levine, in the Norfolk County Superior Court. That action was removed to this court on motion of the Town of Walpole and Town of Walpole Police Officers under Civil Action No. 00-10376-GAO. Sometime later, in that same state court action, defendant Levine filed a similar notice of removal to this court. Instead of being consolidated, then and there, with Civil Action No. 00-10376-GAO, that removal was docketed as Civil Action No. 00-12541-GAO. In the meantime, plaintiff brought direct suit (*i.e.*, not a removed action) against various Massachusetts State Police Officers and the Commonwealth of Massachusetts under Civil Action No. 00-10384-GAO. On a later occasion, all of the cases were consolidated under 00-10376-GAO, and subsequent amendments to the pleadings (including an amended complaint, a second amended complaint, and a third amended complaint) have been made under Civil Action No. 00-10376-GAO.

Plaintiff has also brought suit against a forensic dentist employed by the Massachusetts Medical Examiner (Dr. Kathleen M. Crowley) and two others (Kessler and Evans) in the Massachusetts Medical Examiners Office. Those claims were brought under Civil Action No. 00-10376-GAO after consolidation. The action brought against Dr. Lowell Levine was brought, as previously indicated, under Civil Action No. 00-10384-GAO, as a removed action. In Civil Action No. 00-10376-GAO, defendants Crowley, Kessler and Evans, filed a motion to dismiss. That motion, in turn, was referred to this court for report and recommendation under the provisions of Rule 2(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. This court issued a report and recommendation on that motion on or about May 15, 2003 (adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)).

The remaining defendants (*e.g.*, the Town of Walpole and various and sundry Walpole Police Officers in Civil Action No. 00-10384-GAO and 00-12541-GAO) have also filed motions for summary judgment. With the exception of the motion to dismiss filed by the Commonwealth of Massachusetts (which was continued on account of the unavailability of counsel for the Commonwealth), this court heard all other motions on the same day as it did with respect to the motion referred to in this Report and Recommendation. A Report and Recommendation as to the motions filed by the Town of Walpole and its police officers will follow this report and recommendation in a separate report and recommendation, as will a report and recommendation on the motion to dismiss filed by the Commonwealth of Massachusetts.

[2] The original complaint in Civil Action No. 00-10384-GAO, remains the current complaint. Plaintiff has, however, twice amended his complaint in Civil Action No. 00-10376-GAO, and the current complaint in that case is the Third Amended Complaint.

[3] A more detailed description of the material undisputed facts as found by this court are set forth where relevant to the issues raised by the motion and opposition thereto.

investigation towards the plaintiff, Edmund F. Burke. Plaintiff voluntarily provided certain forensic materials to the State Police, and voluntarily provided a dental impression to Dr. Crowley, then (and now) a forensic dentist assigned to the Medical Examiner's Office of the Commonwealth of Massachusetts. That dental impression, in turn, together with the photographs of the bite mark found on Mrs. Kennedy's breast, was forwarded to Dr. Lowell Levine (hereinafter "Levine" or "Dr. Levine"). Levine opined that the dental impressions voluntarily given to Dr. Crowley by plaintiff matched the bite marks observed on the body of the victim, Mrs. Kennedy. Based on that, and other information, the Massachusetts State Police, by and through the offices of the District Attorney, applied for and received an arrest warrant for the plaintiff. Plaintiff was subsequently arrested, and was held in custody. Thereafter, at or about the same time, a forensic DNA examination was conducted in a State of Maine laboratory, and that DNA examination apparently cast doubt on the contention that Burke murdered Kennedy.[4] Based on a *nolle prosequendum* filed some forty days thereafter by the District Attorney, plaintiff was released from custody.

At bottom, insofar as relevant here, plaintiff alleges that the conduct of all of defendants, including defendant Commonwealth of Massachusetts, caused his improper arrest, continued detention, and search of his premises, in violation of his Fourth Amendment rights and Fifth Amendment rights (Counts II, III, and IV). He also alleges pendent state law claims.

---

[4] This conclusion by the Maine laboratory was brought to the attention of the initial arraignment judge in the state court on December 11, 1998, the day after plaintiff's arrest. Notwithstanding that, the district judge ordered plaintiff held without bail.

The Commonwealth of Massachusetts has filed a motion to dismiss (# 232) contending that it is immune from suit as to all claims brought against it save the claim under G.L. c. 258, § 1, *et seq*. (The Massachusetts Tort Claims Act), and that, as to that latter claim (Count XIV - under the Massachusetts Tort Claim Act), the Commonwealth of Massachusetts cannot be sued in the United States District Court for the District of Massachusetts.

I. Material Undisputed Facts *vis a vis* Claims Against the Commonwealth[5]

To the extent that plaintiff brings claims against defendant Commonwealth of Massachusetts, this court finds the following material facts to be undisputed:

1. Dr. Lowell Levine is a leading forensic dentist[6] with a practice in New York State. As a forensic dentist, he has examined "thousands and thousands" of dentitions.[7] He was and is a diplomate and a fellow of the American Board of Forensic Odontology (hereinafter "ABFO"),[8] being one of the founding diplomates of the ABFO.[9] And because of his experience and expertise, he has served as mentors for others.[10]

---

5 Although the Commonwealth has filed a motion to dismiss, and not a motion for summary judgment, this court nevertheless sets forth those material facts found to be undisputed (or undisputable) solely for the purpose of providing context to the motion to dismiss filed by the Commonwealth of Massachusetts.

6 Indeed, on one occasion, the expertise of Dr. Levine was sought by Jeffrey Denner, Esq., who represented the plaintiff in the underlying criminal case, and who serves as counsel for plaintiff in this case. Plaintiff's Statement Per Local Rule 56.1 Submitted on Behalf of Edmund Burke (# 228, ¶ 11) (hereinafter "Plaintiff's Statement of Undisputed Facts")., Exhibit C, p. 28. Exhibit C includes the deposition of Dr. Levine taken by counsel for plaintiff, and is hereinafter referred to as the "Levine Deposition".

7 Levine Deposition, p. 41.

8 Plaintiff's Statement of Undisputed Facts. ¶ 11.

9 Levine Deposition, p. 42.

10 Plaintiff's Third Amended Complaint (in Civil Action No. 00-10376-GAO), ¶ 48.

2. During the course of the investigation of the death of Irene Kennedy, photographs of a bite mark on Mrs. Kennedy's breast were taken, and plaintiff provided the police with his dentition.

3. Dr. Levine was retained by the Norfolk County District Attorney's office to give an opinion as to the origin of the bite mark on Mrs. Kennedy's breast;

4. On or about December 6, 1998, based on that which had been provided to him, including plaintiff's dentition, Dr. Levine opined that, as of that date, he was unable to positively state to a reasonable degree of scientific certainty that plaintiff was the source of the bite mark.

5. Thereafter, Dr. Levine was provided with additional photographs of the bite marks found on Mrs. Kennedy's breast. Based on these photographs, Dr. Levine opined with a reasonable degree of scientific certainty[11] that plaintiff caused the bite marks on Mrs. Kennedy's breast.

6. While not gainsaying the view that he knew that his opinion was important, he was unaware - purposefully so[12] - of other evidence the authorities may have had concerning the murder, he was unaware that the authorities intended to obtain an arrest warrant immediately upon his rendering of his

---

[11] Dr. Levine construed the term, "reasonable degree of scientific certainty", as a "high degree of probability."

[12] Levine Deposition, (p. 37):

Q. At any time prior to your giving your opinion to a Massachusetts state trooper did you consider whether it would be appropriate to reserve judgment until the DNA testing was completed.
A. No.
Q. Why not.
A. Because we don't – the DNA testing, we were supposed to do blind testing with the bite mark evidence. The police officers and the prosecutors consider the totality of the case. So that we're not supposed to know the results of DNA testing, even if they were able to get sequence data prior to giving our results. Our testing is supposed to be done blind, not knowing what other results are. (Emphasis added).

opinion, and he was then (and currently) of the view that an arrest warrant would not be issued solely on the basis of his opinion.[13]

7. State Police officer Steven McDonald was advised by Dr. Levine that, in his [Levine's] opinion, it could be said with a reasonable degree of scientific certainty that plaintiff caused the bite marks on Mrs. Kennedy's breast.[14]

8. This opinion was reported to Walpole Police Officer James Dolan [a defendant herein] who, in turn, after the District Attorney had concluded that the plaintiff should be arrested, incorporated that opinion in a report submitted to a clerk-magistrate of the Wrentham District Court in connection with the filing of a criminal complaint and the issuance of an arrest warrant.[15]

---

[13] As set forth in the Levine Deposition (p. 37):

Q. Okay...did you know that they were attempting to get a warrant?
A. I don't recall that they were attempting to get a warrant.
Q. Did you know that they were going to arrest Mr. Burke based on your opinion?
A. Police officers do not make arrests based on my opinion. They make arrests on the totality of the case.

* * * *

Q. Okay. And do you remember any conversation in which you were told that there was a drafted warrant on the computer and what they were waiting for specifically was whether or not you could give an opinion to a reasonable scientific certainty?
A. I don't remember a conversation like that. (Emphasis added).

[14] Dr. Levine testified that he usually qualifies his opinions by indicating that the phrase, "reasonable degree of scientific certainty, means a "high degree of probability." But he could not recall if he conveyed that language when he spoke to Trooper McDonald on the telephone. We accordingly assume, for purposes of this motion for summary judgment, that Dr. Levine did not convey that cautionary caveat.

[15] The report prepared in connection with the application for an arrest warrant (Docket # 67, Deposition Exhibit 32A through the top of 32B) consisted of some seventeen (17) pages of incident reports, and was replete with matters and evidence suggesting that there was probable cause to believe that the plaintiff murdered Irene Kennedy. In terms of forensics and other indicia of probable cause, the applying officer indicated that:

> On 12-01-98 Irene Kennedy was brutally murdered in Bird Park. A State Police K-9 unit conducted a track from the victim. The K-9 lead directly to Edmund Burke's front door at 315 Pleasant St.
>
> Edmund was interviewed and he said that he had been sleeping all morning. Our

(continued...)

In preparing that report for the clerk magistrate, Officer Dolan had no reason to believe that the opinion rendered by Dr. Levine was anything but accurate.[16] That opinion was also reported to State Police Officer Scott Jennings who, in turn, incorporated that opinion in an affidavit filed in connection with an application for a search warrant to search defendant's premises on December 10, 1998.

9. The clerk-magistrate of the Wrentham District Court, upon receipt of Officer Dolan's report, issued a warrant of arrest. The plaintiff's arrest was based on and pursuant to that arrest warrant.[17]

---

[15] (...continued)
investigation revealed two independent witnesses who saw him outside of his house in his yard on the morning of the murder. They also described the clothing he was wearing. He has denied owning clothing of this type.

Edmund has changed his story several times during the course of this investigation to try and explain his actions. They are all inconsistent.

Preliminary autopsy reports indicated that Irene Kennedy had been bitten on her breasts. These bites appear to be human. They were examined by Forensic Dentist Kate Crowley of the Medical Examiners Office and compared to impressions of Edmund Burke's teeth.

She requested that Dr. Lovell Levine examine them also. He is the leading expert in the country and has testified as such. He is a Forensic Dentist with over thirty years of experience. He determined that the marks were bite marks made by human teeth. He has also determined with reasonable scientific certainty that the they [sic] were made by Edmund Burke. (Emphasis added).

Based on the above facts, there is probable cause to believe that Edmund Burke entered Bird Park on the morning of 12-1-98 and brutally murdered Irene Kennedy. I am requesting a warrant for his arrest for murder.

[16] That is to say, there is not a scintilla of evidence showing - indeed, not even a conclusory allegation - that Officer Dolan had any reason to question the expertise of the opinion rendered by Dr. Levine, someone whom he [Dolan] considered to be the leading forensic expert in the field of dentistry in the country. *See* note 15, *supra*.

[17] When this court issued its report and recommendation (# 231) on motions to dismiss filed by defendants Crowley, Kessler, and Evans, on May 15, 2003, adopted, approved, and entered by the district judge to whom this case is assigned on August 5, 2003 (# 267)(with a modification adding an additional ground for the dismissal of the constitutional tort claim brought under the provisions of the Massachusetts Civil Rights Act, (G.L. c. 12, § 11(H)), there was a question remaining as to whether a warrant of arrest had issued. See Report and Recommendation (# 231, p. 12 and n. 17). Since that time, based on additional matters submitted in connection (continued...)

10. At or about 11:00 a.m., December 10, 1998,[18] and before Officer Dolan applied for the arrest warrant, an employee at the Maine State Laboratory reported to two Massachusetts State troopers that DNA analyses concluded that the saliva found at the scene of the crime was not that of the plaintiff. That information was not made known to Dr. Levine at any time prior to his

---

[17] (...continued)
with the various and sundry motions for summary judgment, this court finds and concludes that all of the relevant and material evidence points to but one conclusion as a matter of law - that the warrant had issued prior to plaintiff's arrest. That is to say, all the material evidence would not permit a reasonable trier of fact to conclude that plaintiff's arrest was not made pursuant to a warrant.

Officer Dolan testified at his deposition that he applied for an arrest warrant, and that that arrest warrant was issued by Clerk Magistrate Edward Doherty on December 10th. The arrest warrant and return thereon has been submitted as an exhibit (Exhibit U to the Statement of Undisputed Facts (# 219) filed by the Town of Walpole and its various police officers) and # 259, Exhibit U. The first docket entry - entitled to conclusive effect in the absence of a showing to the contrary, *Howard v. Local 74, Wood, Wire and Metal Lathers International*, 208 F.3d 930, 934 (7th Cir. 1953) - in plaintiff's underlying criminal case indicates that he was arrested on a warrant. (# 259, Exhibit U). State Police Officer Kevin Shea, in response to a question put to him at a deposition by counsel for the plainttiff, testified that the arresting officers had a warrant at the time they arrested the plaintiff (# 259, Exhibit D - Deposition of Kevin Shea, pp. 138-139). Plaintiff has proffered nothing of substance which even remotely suggests to the contrary. All he says is that Town of Walpole Police Chief testified to the contrary. The rather quixotic portion of the testimony he relies upon, however, hardly says that a warrant was not issued before the arrest. When asked when he [Chief Betro] formed an opinion as to the guilt of plaintiff, Chief Betro testified (Town of Walpole Statement of Undisputed Facts (# 219, Exhibit W, p. 89))

> Well, after the arrest was made I was informed as to, I was not privy at that time to any meetings which were, or any, that were going on in my station with the District Attorney and the state police and my detectives, as well. The decision was made to seek an arrest warrant. After the fact I was told to seek an arrest warrant. (Emphasis added)

Plaintiff excerpts the underscored above for the remarkable position that a warrant was not issued before the arrest of the plaintiff. What plaintiff omits, however, is that which immediately follows in that same answer, to wit:

> An Affidavit was put together by the state police and an arrest warrant, Detective Dolan went to court to obtain the warrant and they went down to make the arrest. At that point in time I was informed they were going down to arrest Ed Burke. (Emphasis added).

In context, plaintiff cannot, from this, realistically suggest that the warrant was issued after plaintiff's arrest. It is but a line taken out of context in connection with a question put concerning an entirely different matter and, purposefully or otherwise, left in an ambiguous state by the examiner - in this case, counsel for the plaintiff.

[18] There is a question as to this date. Other evidence suggests that Trooper McDonald became aware of the DNA reports on December 11, 1998, after plaintiff's arrest, and not on December 10, 1998. State Police officer Kevin Shea testified at his deposition that he was first notified of this fact by Trooper Steven McDonald on December 11 - the date of plaintiff's arraignment, and that he [Shea] immediately relayed that information to the prosecutor who, in turn, advised plaintiff's defense counsel and the arraignment judge. For purposes of the motion for summary judgment, however, this court assumes the December 10th date.

rendering his opinion, or, indeed, prior to the arrest of the plaintiff.[19] Nor was that information made known to Officer Dolan before he applied for the arrest warrant, or to any arresting officer until after the arrest of the plaintiff.[20]

---

[19] In a subsequently filed pleading, that is, his opposition (# 262, p. 5)t o a motion for summary judgment filed by the Massachusetts State Police Officers, plaintiff misrepresents the record in suggesting that Dr. Levine was aware of the DNA report before the arrest of the plaintiff. Plaintiff says (# 262, p. 5):

> At 11:00 a.m., on the morning of December 10, 1998, Theresa Callichio of the Maine State Police Lab informed Trooper McDonald that the DNA excluded Mr. Burke. McDonald claims that he told at least two people of this call, Assistant District Attorney John Kivlan, (a prosecutor) and Lowell Levine. Lowell Levine, in an astonishing display of arrogance, immediately assumed that the DNA must have been contaminated, and told that to McDonald. Deposition Transcript of Steven McDonald, p. 109, appended as Exhibit L to Defendant Mattaliano, Et Al's Statement of Undisputed Facts. (Emphasis added).

Putting to one side plaintiff's unsupported oratory ("an astonishing display of arrogance"), which is not apparent from the record, and putting to one side plaintiff's erroneous reference (there is no p. 109 to the Deposition transcript appended as Exhibit L - this court, however, searched other submissions and found page 109 in the Deposition of Steven McDonald at Exhibit I of plaintiff's own earlier opposition (# 228) to the motion to dismiss or for summary judgment filed by defendant Levine), the suggestion that Levine was aware of the DNA report before the arrest of the plaintiff is erroneous, at best, deceiving, at worst. In fact, as it shows without equivocation on page 108 of that same deposition, that conversation was held on December 11, after plaintiff's arrest, at or about the time of arraignment, to wit:

Q. Okay. Now let's get back to Lowell Levine, you have this conference with Levine on the day of arraignment?
A. Correct.

Counsel for plaintiff, who asked the very question, and who received the very answer, surely must have known better to suggest, in a misleading way, that Levine (or anyone else except, perhaps, Trooper Steven McDonald) knew anything about the DNA reports before the arrest of the plaintiff.

Elsewhere, in a similar vain, counsel for plaintiff allows (Opposition # 262, p. 5):

Later that afternoon, McDonald told Levine that the police still desired to arrest Mr. Burke and the decision hinged on Levine's willingness to stand by his previously drawn conclusions. Id. at 130.

The reference to page 130 of the McDonald deposition transcript, however, says no such thing. This court's reading of the entirety of the McDonald affidavit reveals nothing of the sort. It is, again, something that plaintiff has woven from whole cloth without any regard to the true state of the record before this court. While plaintiff may wish to roll his dice before a jury, a consistent theme throughout his oppositions, he may not take liberty with the record and misrepresent that record to bring his case before a jury.

[20] At the hearing before this court, which included motions for summary judgment filed by all the parties (excepting Crowley, Kessler, Evans, or the Commonwealth of Massachusetts), counsel for plaintiff, while unable to point to any factual support, argued, for the first time, insofar as this court can determine, that it could be reasonably inferred that since Trooper Steven McDonald and Trooper Robert Martin received the information concerning the DNA testing on December 10, 1998, one or the other imparted that same information to Officer Dolan prior to the time that he applied for the arrest warrant, and prior to the time that plaintiff was arrested. Until the hearing on the motions, plaintiff had not even alleged that Officer Dolan was made aware of the DNA report.

That, however, is pure speculation and conjecture - a suggestion woven from whole cloth, and nothing else. Indeed, the only evidence which plaintiff has discovered on this matter is that, whatever the date Trooper

(continued...)

11. As of the present time, Dr. Levine remains of the opinion to a reasonable degree of scientific certainty[21] that the bite mark on the breast of Ms. Kennedy matched the dentition of the plaintiff. And plaintiff has proffered no

---

[20] (...continued)
McDonald may have thought that he received that information, he did not impart that information to anyone until December 11, 1998, the day after plaintiff's arrest, and, then, only to Massachusetts State Trooper Kevin Shea and Assistant District Attorney John Kivlan - not to Officer Dolan at any time. Nothing could be clearer from the testimony of Trooper Steven McDonald, upon which plaintiff relies as suggesting that Trooper McDonald was aware of the DNA tests on December 10, to wit (Exhibit I to Plaintiff's Local Rule Statement (# 228 - Deposition of Steven McDonald, pp. 108-109):

A. I spoke with the Maine state police directly, the lab.
Q. And they told you they excluded him [Burke]?
A. Excluded. The profile does not match.
Q. And it's your testimony you communicated that immediately to John Kivlan?
A. Yes.
Q. Do you know as you sit here one way or the other whether that was communicated to the Judge at the arraignment.
A. I don't know. I talked to – Sergeant Shea was at the arraignment with [Assistant District Attorney] Jerry Pudolsky who was the ADA handling the case and I also spoke with Kevin and let him know what was going on.
Q. Did you speak to Pudolsky directly?
A. No, I did not. John Kivlan and Jerry Shea were the two I spoke to.

And that arraignment attended by ADA Pudolsky and Trooper Shea, of course, was held on December 11, the day after plaintiff's arrest. Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit N (Deposition of Kevin Shea, pp. 143-144)); Town of Walpole's Local Rule 56.1 Statement (# 219 - Exhibit V (Deposition of Gerald Pudolsky, pp. 37-43)). State Police Officer Shea also testified that he first learned of the DNA results on December 11 - the day of the arraignment, and not on the day of arrest (# 259, Exhibit D - Deposition of Kevin Shea, p. 143)).

[21] As Dr. Levine (then and now) understood that phrase, to wit: a "high degree of probability."

meaningful evidence to the contrary,[22] putting to one side the mere *ipse dixit* of counsel for plaintiff.[23]

II. The Claims Against the Commonwealth

---

[22] Consistent with discovery and other scheduling deadlines, first imposed by the district judge to whom this case is assigned, and later by this court on motions for extensions of time, the plaintiff did not designate any expert on the matter of forensic dentistry or bite mark comparisons.

In terms of actual evidence, plaintiff only proffered his own lay opinion, to wit: "It is scientifically impossible for my dentition to match bite marks found on Irene Kennedy's body." (Affidavit of Edmund F. Burke, # 227, ¶ 6), and evidence of the fact that DNA analyses excluded plaintiff as the owner of the saliva found on Mrs. Kennedy's body. The Burke Affidavit says nothing, since there is nothing whatsoever showing that he is qualified to give any sort of scientific opinion. So, too, with the DNA evidence. That augured against a match of saliva, but it did not, and still has not, shown that Dr. Levine's opinion was or is inaccurate to a reasonable degree of scientific certainty.

Plaintiff has one more arrow in his sheath in an attempt to suggest to the contrary. Contrary to prior orders of this court relating to the designation of experts, plaintiff attempted to do indirectly that which he could not do directly. He submitted his Supplemental Opposition to Lowell Levine's Motion for Summary Judgment (# 226), something which plaintiff describes as a timely filed "Rule 26 Report and Affidavit of Richard Souviron, D.D.S. We do not know what plaintiff means by saying that this filing was timely. It was not.

On February 27, 2003, given the fact that plaintiff has had more than three years in which to prepare his case, this court, by Order (# 208) of that same date, denied plaintiff's motion for an extension of time to designate experts (# 205). Plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts. Instead, some two months later, he filed a motion for reconsideration (# 213) of that earlier order. On April 10, 2003, this court denied that motion for reconsideration. Again, plaintiff did not seek any review of that Order (# 208) by the district judge to whom this case is assigned consistent with the provisions of Rule 72(a), F.R. Civ. P. or Rule 2(a) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, and any attempt to do so now would be clearly untimely and improper. *See e.g.*, Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *see also*, *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

And, in any event, Dr. Souviron says nothing which casts any doubt whatsoever on the opinion of Dr. Levine. At best, Dr. Souviron avers that he [Souviron] is unable to form an opinion on the basis of that given to him by counsel for the plaintiff. That says nothing.

[23] Notwithstanding the fact that co-counsel for plaintiff previously used the expert services of Dr. Levine for his [then] client's benefit, lead counsel for the plaintiff off-handedly, and without citation to any meaningful authority, simply argued that bite mark evidence is but "junk science." That view, however, is not shared by any others who should know, so far as this court can determine. To the contrary, some thirty jurisdictions (and there may be more, but simply not reported), including the Commonwealth of Massachusetts, have concluded that, far from being the "junk science" that counsel now suggests, bite mark evidence is relevant, reliable, and admissible. *See e.g.*, *Commonwealth v. Cifizzari, 397 Mass. 560, 492 N.E.2d 357 (1986); State v. Blamer,* 2001 WL 109130 at *4 (Ohio App. 5 Dist., 2001); *Seivewright v. State,* 7 P.3d 24, 29-30 (Wyo.2000); *Brooks v. State,* 748 So.2d 736, 739 (Miss.1999); *People v. Marsh,* 177 Mich.App. 161, 441 N.W.2d 33, 36 (1989); *State v. Armstrong,* 179 W.Va. 435, 369 S.E.2d 870, 877 (1988); *State v. Stinson,* 134 Wis.2d 224, 397 N.W.2d 136, 140 (Ct . App.1986); *Spence v. State,* 795 S.W.2d 743, 750-52 (Tex.Crim.App.1990); *Sievewright v. State of Wyoming*, 7 P.3d 24 (2000); see also, *Brooks v. State of Mississippi*, 748 So.2d 736, 746-47 (1999)(referring to some twenty or more jurisdictions in which bite mark evidence is admissible).

On or about December 14, 2000, plaintiff apparently[24] filed direct claims against the Commonwealth of Massachusetts (and other State officials) under Civil Action No. 00-12541-GAO. Assuming that the Commonwealth of Massachusetts was meant to be a defendant when that complaint was filed, see note 24, *supra*, plaintiff brought claims against the Commonwealth alleging a substantive violation of his civil rights under 42 U.S.C. § 1983 (Count II)[25] and the Massachusetts Civil Rights Act, G.L. c. 12, § 11H (Count IV). He also alleges that the Commonwealth of Massachusetts conspired to violate his civil rights in violation of 42 U.S.C. § 1983 (Count III). In another count (Count VIII), plaintiff alleges "vicarious liability" on behalf of the Commonwealth. In Count IX, he apparently[26] brings an intentional tort claim - *i.e.*, intentional infliction of emotional distress - against the Commonwealth. So, too, in Counts X and XI, where the plaintiff apparently[27] brings illegal search and seizure, conversion, and invasion of privacy claims against the Commonwealth. And in Count XIV, the plaintiff pleaded a (then) non-claim. That is to say, plaintiff pleaded a claim against the Commonwealth of Massachusetts under the Massachusetts Tort Claims Act (G.L. c. 258, § 1 *et seq.*), but indicated that that count was

---

[24] We say "apparently" because, although the Commonwealth of Massachusetts was included in the caption of the case, and the Commonwealth of Massachusetts was referred to in a "non-active" Count XIV, see note 28, *infra*, Paragraphs 2 through 13 of that Complaint specifically described the defendants in that action, and the Commonwealth of Massachusetts is not referred to in those descriptive paragraphs.

[25] Plaintiff qualifies this term, however, by saying (without attempting to interpret what is meant thereby):

> This Count is pleaded per Fed.R.Civ.P. 11 solely to preserve appellate arguments that the Commonwealth should be liable. (Emphasis added).

[26] We say "apparently" here because, in other counts (*e.g.*, Counts VI, VII, and VIII) alleging state law intentional torts, plaintiff specifically excludes the Commonwealth, and the reason for excluding the Commonwealth on some intentional state law claims and not others escapes this court at first blush.

[27] See note 26, *supra*.

not then and there active, that it was being asserted more or less as a place holder, so to speak, for a later claim.[28] That later claim (# 95) was filed on or about May 30, 2001.

III. The Motion to Dismiss

The Commonwealth of Massachusetts moves to dismiss. With respect to the civil rights claims brought under 42 U.S.C. § 1983 (both substantive and for conspiracy), the Commonwealth contends that it is not a "person" within the meaning of Section 1983. It further contends that suit - to the extent that plaintiff seeks monetary relief - is barred by sovereign immunity. With respect to the Massachusetts Civil Rights claim brought under the Massachusetts Civil Rights Act, G.L. c. 12, § 11H (Count IV), as well as the intentional torts (intentional infliction of emotional distress, illegal search and seizure, conversion, invasion of privacy, and "vicarious liability"), the Commonwealth again contends that it is immune from suit under the doctrine of sovereign immunity. And as to the claim (Count XIV) brought under the Massachusetts Tort Claims Act, the Commonwealth contends that it is immune from suit in a federal court.

IV. The Federal Civil Rights Claims

In the circumstances, this court recommends that the district judge to whom this case is assigned dismiss the federal civil rights claims - substantive and conspiracy - brought against the Commonwealth under Counts II and III. For one thing, it is clear beyond peradventure that the Commonwealth of Massachusetts is not a "person" within the meaning of Section 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 64

---

[28] At the time the original complaint was filed, plaintiff had not exhausted his available state remedies under the Massachusetts Tort Claims Act, and, accordingly, suit would have been premature. This court later allowed a motion to amend (# 95 filed under Civil Action No. 00-10376-GAO after the actions were consolidated), and Count XIV is currently a viable count.

(1989). That, alone, ends the matter. But for another thing, and beyond that, and just as dispositive, the Commonwealth of Massachusetts *qua* the Commonwealth of Massachusetts, under settled principles of sovereign immunity, is absolutely immune from suit under Section 1983. E.g., *Quern v. Jordan*, 440 U.S. 332, 341 (1979). The federal civil rights claims must be dismissed.[29]

V. The Civil Rights Claims under G.L. c. 12, § 11H (Count IV)

To the extent that plaintiff brings a state law civil rights claim under the provisions the Massachusetts Civil Rights Statute (G.L. c. 12, § 11H (Count IV)), that claim is likewise barred, as a matter of state law, on the grounds that the Commonwealth of Massachusetts has not waived its sovereign immunity *vis a vis* claims brought against it under the Massachusetts Civil Rights Act. *E.g.*, *Bain v. Springfield*, 424 Mass. 758 (1997); *Commonwealth v. Elm Medical Laboratoreis,* Inc., 33 Mass.App.Ct. 71, 596 N.E.2d 376 (Mass.App.Ct. 1992);[30] *Boulais v. Commonwealth of Massachusetts*, 2002 WL 225936

---

[29] Plaintiff concedes as much. In his opposition (# 249, p. 23, Section VIII), plaintiff says:

> The plaintiff has asserted section 1983 claims against the Commonwealth. The Commonwealth seeks dismissal of these claims as a matter of law. The Commonwealth is correct that such claims do not lie as the law is presently construed.
>
> Plaintiff wishes to preserve appellate arguments that the law should be changed.

[30] There the Massachusetts Appeals Court observed (*Id.* at 380-381):

> We recognize that the State Civil Rights Act, being remedial, "is entitled to liberal construction of its terms," *Batchelder v. Allied Stores Corp.,* 393 Mass. at 822, 473 N.E.2d 1128; *Redgrave v. Boston Symphony Orchestra, Inc.* 399 Mass. 93, 99, 502 N.E.2d 1375 (1987), but that rule of construction is not enough to overcome the absence of *any* manifestation of the intention of the Legislature to waive sovereign immunity in the enactment of the State Civil Rights Act. There is nothing in G.L. c. 12, §§ 11H or 11I, that even suggests that the Legislature intended a waiver of sovereign immunity. (Emphasis added).

(D.Mass. January 30, 2002);[31] *Manning v. Furman*, 2000 WL 282484 (Mass.Super. February 7, 2000). Additionally, for purposes of suit under G.L. c. 12, § 11, the Commonwealth of Massachusetts is not a "person" amenable to suit. Count IV must be dismissed.[32]

---

[31] *Boulais* was an opinion authored by Judge O'Toole, the district judge to whom this case is assigned. In *Boulais*, Judge O'Toole observed, *inter alia*, relevant to the civil rights claim under c. 12, § 11, but also to the remaining state law intentional tort claims:

> Counts One through Five are not directed at the Commonwealth or Colonel DiFava. The state law claims against the Commonwealth in Counts Six, Eight, Nine, Ten, and Eleven are barred. The Eleventh Amendment bars actions in federal courts claiming damages against a state and its agencies unless the state has consented to be sued in federal court. *See Pennhurst v. Halderman,* 465 U.S. 89, 99 (1984)(holding that the state's consent to being sued must be express and unequivocal); *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct and Sewer Auth.,* 991 F.2d 935, 938 (1st Cir.1993). Even if the plaintiff had named Colonel DiFava in his official capacity in these state law claims, the claims would still be barred because a suit for damages against a state official in his official capacity is a suit against the state. *See Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989). Pendant jurisdiction does not override the Eleventh Amendment bar to these state law claims. *See Pennhurst,* 465 U.S. at 121.
>
> The state law claims in Counts Six, Nine, and Eleven are also barred under the principles of sovereign immunity. Sovereign immunity may only be abrogated explicitly by the consent of the State or by a valid act of Congress. *See Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 75-76 (2000). The only waiver of sovereign immunity in the relevant state law claims is in the Massachusetts Tort Claims Act in Count Six. However, the Tort Claims Act does not waive sovereign immunity in federal courts. *See Irwin v. Commissioner of the Dep't of Youth Servs.,* 448 N.E.2d 721, 724 (Mass.1983) (holding that the Act only waives sovereign immunity for a claim brought in Massachusetts Superior Court).
>
> Counts Seven and Ten are dismissed as to the Commonwealth because the Commonwealth is not a "person" amenable to suit under the federal or state civil rights statutes. Count Seven alleges a federal civil rights violation against the Commonwealth based on gross negligence. To the extent that this claim seeks damages under 42 U.S.C. § 1983, it must be dismissed because the Commonwealth is not a "person" subject to suit under § 1983. *See Will,* 491 U.S. at 64. The plaintiff does not allege any ongoing violations of her civil rights; therefore, *Ex Parte Young,* 209 U.S. 123 (1908), does not provide a basis for prospective injunctive relief. Count Ten alleges that the Commonwealth violated the plaintiff's state civil rights under Mass. Gen. Laws ch. 12, § 111. This claim is barred because the Commonwealth is not a "person" within the meaning of the state Civil Rights Act. *See Commonwealth v. Elm Med. Labs.,* 596 N.E.2d 376, 379 (Mass.App.Ct.1992). (Footnotes omitted).

[32] In his opposition (# 249) to the motion to dismiss filed by the Commonwealth, plaintiff makes no argument - much less a principled argument, concerning his right to sue the Commonwealth of Massachusetts under the Massachusetts Civil Rights statute.

As we observed in our Report and Recommendation with respect to the motion for summary judgment filed by the Massachusetts Police Officers, in referring to the holding in *United States v. Bongiorno*, 106 F.3d 1027, 1034 (1st Cir. 1997):

(continued...)

VI. The Intentional Tort Claims (Counts IX, X, and XI)

To the extent that plaintiff asserts intentional torts - *i.e.*, intentional infliction of emotional distress, illegal search and seizure, conversion, and invasion of privacy - the Commonwealth is likewise absolutely immune from suit on these intentional tort claims by virtue of the Massachusetts Tort Claims Act, specifically, G.L. c. 258, § 10(c). Section 10(c) specifically provides that the Commonwealth is immune from suit on any claim arising out of an intentional tort. *E.g.*, *Boulais v. Commonwealth of Massachusetts*, *supra*;[33] *Mellinger v. Town of West Springfield*, 401 Mass. 188, 515 N.E.2d 584, 589 (1987); *Camoscio v. Hanley*, 1996 WL 1353296 *2 (Mass.Super. April 3, 1996).[34] Counts IX, X, and XI, must be dismissed.

VII. The Vicarious Liability Count (Count VIII)

---

[32] (...continued)

To make a bad situation worse, the appellant's briefs in this court advance these alleged constitutional violations in vague and cryptic terms. Appellate judges are not clairvoyants, and it is surpassingly difficult for us to make something out of nothing. *Cf.* William Shakespeare, King Lear act 1, sc. 4 (1605). We have steadfastly deemed waived issues raised on appeal in a perfunctory manner, not accompanied by developed argumentation, *see*, *e.g.*, *Martinez v. Colon*, 54 F.3d 980, 990 (1st Cir.), *cert. denied*, 516 U.S. 987, 116 S.Ct. 515, 133 L.Ed.2d 423 (1995); *Ruiz v. Gonzalez Caraballo*, 929 F.2d 31, 34 n. 3 (1st Cir.1991); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.), *cert. denied*, 494 U.S. 1082, 110 S.Ct. 1814, 108 L.Ed.2d 944 (1990), and this case does not warrant an exception to that salutary practice. "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work...." *Zannino*, 895 F.2d at 17.

To that, this court here would only add that district judges, like appellate judges, are not clairvoyants. All authority pointing to the position that the Commonwealth of Massachusetts cannot be sued under the Civil Rights Act, plaintiff, by his thundering silence on this point, apparently assumes that the Commonwealth is correct in this respect.

[33] And see note 31, *supra*, and the holdiing in *Boulais*.

[34] Again, plaintiff says absolutely nothing in his Opposition (# 249) suggesting that the Commonwealth can be sued for an intentional state law tort. See note 15, *supra*. See also, note 32, *supra*.

In Count VIII, plaintiff says, without reference to statute or authority, that the Commonwealth of Massachusetts is "vicariously liable" for the torts of its agents.[35]

To the extent that plaintiff means to suggest that the Commonwealth of Massachusetts is "vicariously liable" under Section 1983, he is wrong for three reasons: (1) for the reasons set forth above, the Commonwealth of Massachusetts is not a "person" within the meaning of Section 1983; (2) for the reasons set forth above, the Commonwealth cannot be sued under Section 1983; and (3) even if the Commonwealth was a "person", and even if the Commonwealth could be sued under Section 1983, Section 1983 does not admit of "vicarious liability." *E.g.*, *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978).

To the extent that plaintiff means to suggest that the Commonwealth of Massachusetts is "vicariously liable" on account of the state law intentional torts allegedly committed by other agents or employees of the Commonwealth of Massachusetts, as we set forth in Parts V and VI above, Section 10(c) of the Massachusetts Tort Claims Act specifically provides that the Commonwealth is immune from suit on <u>any</u> claim arising out of an intentional tort. *E.g.*, *Mellinger v. Town of West Springfield*, 401 Mass. 188, 515 N.E.2d 584, 589 (1987); *Boulais v. Commonwealth of Massachusetts*, *supra*;[36] *Camoscio v. Hanley*, 1996 WL 1353296 *2 (Mass.Super. April 3, 1996). It is clear that Section 10(c), which merely restates in positive terms the sovereign immunity enjoyed by the

---

[35] In particular, plaintiff alleges (Complaint ¶ 71):

> To the fullest extent liable under any theory of the law, the Commonwealth of Massachusetts is vicariously liable for the acts of its agents, servants, and employees, including all persons named as defendants, but also including any other persons involved in the unconstitutional and otherwise flawed investigation and aborted prosecution of Edmund F. Burke.

[36] And see note 31, *supra*, and the holdiing in *Boulais*.

Commonwealth of Massachusetts *qua* Commonwealth of Massachusetts bars an action based on "vicarious liability", and plaintiff has proffered nothing to the contrary.[37] Count VIII, bottomed, as it is, on a concept of "vicarious liability", must be dismissed.

VIII. The Massachusetts Tort Claims Act Claim (Count XIV)

In Count XIV, plaintiff alleges that the Commonwealth of Massachusetts is liable to him for damages under the Massachusetts Tort Claims Act (G.L. c. 258, § 1 *et seq.*).

Plaintiff takes pains to suggest in his opposition - unlike his silence as to other claims and other counts - that he states a claim upon which relief may be granted under the Massachusetts Tort Claims Act. But that is beside the point. He may state a claim, but that which he states is clearly brought in the wrong forum, the wrong court.

Under settled principles, although the Massachusetts Tort Claims Act provides a waiver of "sovereign immunity", it is only a limited waiver. And the Massachusetts Supreme Judicial Court, in response to a certified question posed by this Court,[38] has unequivocally held that that waiver extends only to suits brought in the courts of the Commonwealth of Massachusetts, and not suits brought in a federal district court or forum outside of the Massachusetts state courts. *Irwin v. Commissioner of Youth Services*, 388 Mass. 810, 448 N.E.2d 721 (1983); *Boulais v. Commonwealth of Massachusetts*, *supra*.[39] Count XIV must be dismissed without prejudice for want of subject matter jurisdiction.[40]

---

[37] Again, as elsewhere, plaintiff says absolutely nothing in his Opposition (# 249) suggesting that the Commonwealth can be sued for an intentional state law tort. See note 15, *supra*. See also, note 32, *supra*.

[38] *Irwin v. Calhoun*, 522 F.Supp. 576 (D.Mass. 1981).

[39] And see note 31, *supra*, and the holdiing in *Boulais*.

[40] In earlier oppositions filed by the plaintiff, he did not even address the question of immunity from suit within the meaning of *Irwin v. Commissioner of Youth Services*, 388 Mass. 810, 448 N.E.2d 721 (1983).

(continued...)

IX. Conclusion

For the reasons set forth above, this court recommends[41] that the district judge to whom this case is assigned allow the motion to dismiss (# 232) filed by the Commonwealth of Massachusetts to the extent that all claims brought against the Commonwealth of Massachusetts except as to that count (Count XIV) brought under the Massachusetts Tort Claims Act be dismissed for failure to state a claim upon which relief may be granted. With

---

[40] (...continued)

Just prior to the hearing held on September 11, 2003, plaintiff tendered yet another opposition - "Plaintiff's Supplemental Memorandum in Opposition to Commonwealth's Motion to Dismiss" - in which he argues, for the first time, that the Commonwealth waived its immunity.

In support of this rather remarkable (not to mention new) argument, plaintiff says that the Commonwealth, by its prior conduct in this case, waived its immunity. For this, plaintiff relies on *Clark v. Barnard*, 108 U.S. 436 (1883), and *Lapides* v. *Board of Regents of the University of Georgia*, 122 S.Ct. 1640 (2002).

All of the cases upon which plaintiff relies, however, are cases where the State, by and through its legal representative, voluntarily invoked the jurisdiction of a federal court by moving to intervene, or by filing a bankruptcy claim, or by petitioning for removal. This court is unaware of any case (and plaintiff has not proffered any) where a court has held that a state, involuntarily haled into court by a private plaintiff, waives its sovereign immunity by engaging in such conduct as discovery before moving to dismiss.

In this case, it must be remembered, the Commonwealth was more of less a pretend or potential party when the case was first filed. See note 12, *supra*. Plaintiff inserted what best may be referred to as a placeholder, indicating that it would sue the Commonwealth after exhausting its administrative remedies under the Massachusetts Tort Claims Act. In the meantime, the Assistant Attorney General who now represents the Commonwealth (after plaintiff moved to amend his complaint by making the Commonwealth a real party), had entered an appearance on behalf of various individual defendants (i.e., State Police Officers). Later on, other counsel entered an appearance for the State Police Officer in order to avoid any conflict of interest.

The motion to dismiss filed by the Commonwealth (# 232) was the first responsive pleading filed by the Commonwealth. This is not a case where, as suggested by plaintiff, he was "sandbagged" by the Commonwealth. To the contrary, plaintiff completed its discovery against all of the parties. There is no prejudice. Plaintiff may file suit against the Commonwealth in the state courts, where such suits should be filed in the first instance, with the advantage of having completed all discovery and being ready for trial.

[41] The parties are hereby advised that under the provisions of Rule 72(b) of the Federal Rules of Civil Procedure and Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file specific and written objections thereto with the Clerk of this Court within 10 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Secretary of Health and Human Services, 848 F.2d 271 (1st Cir. 1988); United States v. Emiliano Valencia-Copete, 792 F.2d 4 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980); United States v. Vega, 678 F.2d 376, 378-379 (1st Cir. 1982); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); see also, Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466 (1985).

respect to Count XIV brought under the Massachusetts Tort Claims Act, this court recommends that that claim be dismissed without prejudice for want of subject matter jurisdiction.

UNITED STATES MAGISTRATE JUDGE